No. 76-4041

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., ANJO, INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. and NORTHFIELD BLOCK CO.,

Petitioners,

vs.

STATE OF ILLINOIS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Illinois Brick Company, American Brick Co., Ampress Brick Co., Inc., Anjo, Inc., Chicago Block Co., Inc., E. L. Ramm Company, Heights Block, Inc., Joliet Concrete Products, Inc. and Northfield Block Co. hereby petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on June 22, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 536 F.2d 1163 and is printed in the Appendix at page App. 1. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 67 F.R.D. 461 and is printed in the Appendix at page App. 10.

JURISDICTION

The Seventh Circuit's judgment was entered on June 22, 1976. (App. 23.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a civil antitrust suit brought by the State of Illinois alleging price fixing by manufacturers of concrete block, does the State of Illinois, which purchased buildings, one of whose components was concrete block, have a claim for the alleged overcharge paid by the first purchaser of the concrete block, on the theory that the overcharge was passed on to the State of Illinois, even though the chain of distribution of concrete block did not involve any "cost-plus" or similar pricing arrangements?

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

> trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Respondent, the State of Illinois (hereinafter the "State"), on behalf of itself and various governmental entities in the Greater Chicago area, brought this civil action charging that the defendants (the Petitioners), all of whom manufacture and/or sell concrete block, violated Section 1 of the Sherman Act, 15 U.S.C. §1, by conspiring to fix the price of concrete block. The State seeks to recover the alleged overcharge in the price of concrete block used in public building projects. Jurisdiction of the District Court was predicated upon Section 4 of the Clayton Act, 15 U.S.C. §15.

In 1973, the United States indicted the defendants, charging that they violated Section 1 of the Sherman Act by conspiring to fix the price of concrete block. In the wake of the federal indictment, numerous civil treble-damage actions were filed, all alleging the same conspiracy and seeking to recover the same alleged overcharge. The civil cases were brought by masonry contractors, general contractors, private builders and the State. Several of the cases were class actions. All of the civil actions except the State's were settled.

In the State's case, defendants propounded interrogatories to the plaintiffs, seeking detailed information about their purchases of concrete block. Defendants then based

a summary judgment motion on the plaintiffs' answers to the interrogatories.* The plaintiffs did not submit by affidavit, answers to interrogatories or deposition any contradictory or explanatory facts in opposition to the summary judgment motion. The ground for defendants' summary judgment motion was that under this Court's opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), these plaintiffs had no claim since they were not direct purchasers of concrete block, and did not fit the limited "cost-plus" exception recognized in *Hanover Shoe* which would allow them to recover for an alleged pass-on of the alleged overcharge.

The facts in the record for the summary judgment motion were as follows. The State and other governmental entities did not buy concrete block. Instead, they bought buildings, a package of goods and services of which concrete block was merely one component part. Furthermore, the concrete block did not reach the public entities through pre-existing "cost-plus" contracts. Instead, the governmental bodies awarded their building project contracts pursuant to a competitive bidding process. The concrete block produced by defendants is sold to masonry contractors. The masonry contractors submit bids to general contractors for the goods and services that comprise the masonry portions of the building projects. The general contractor in turn collects all sub-bids for goods and services and compiles a bid for a particular building project in competition with other general contractors. Thus, before any of the defendants' concrete block reaches public

* The answers to the interrogatories were in the form of answers to a questionnaire sent out by plaintiffs' counsel.

building projects, it passes through at least two unrestrained levels—the masonry contractors and the general contractors—where complex and independent pricing decisions are made.

It was upon this record that the defendants moved for summary judgment against all plaintiffs who purchased buildings, not concrete block. The District Court classified these plaintiffs as ultimate consumers, *i.e.*, those who obtain a finished product from a middleman in the chain of distribution who has altered or added to the goods received from the manufacturer. The District Court held that the ultimate consumer's injury, if any, was too remote and granted summary judgment. The Court of Appeals reversed.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is In Direct Conflict With A Controlling Decision Of This Court.

The Seventh Circuit's decision which allows indirect purchasers to sue for an alleged illegal overcharge on the theory that it has been passed on to them either in whole or in part conflicts with this Court's decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

In *Hanover Shoe,* a monopolist was charged with exacting an illegally high price for its product, shoe manufacturing machinery. At trial, the monopolist attempted to defend on the ground that plaintiff had, in fact, suffered no injury since plaintiff had passed on the overcharge to its customers by increasing the prices of the shoes it made.

This Court ruled that the first or direct purchaser could recover the full overcharge (trebled) *regardless* of any passing on of that overcharge to others in the chain of distribution, *i.e.*, the indirect purchasers.

In rejecting the passing on defense, the Court stressed the virtual impossibility of proving the pass-on, *i.e.*, establishing a causal link between an overcharge incurred by a business in acquiring supplies or equipment and the pricing decisions of that company's personnel in the competitive market. The Court stated:

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state

> whether, had one fact been different . . ., he would have chosen a different price. . . . Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. *Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.*" (Emphasis added.) 392 U.S. at 492-93.

The Court recognized one limited exception to its ruling that the first purchaser could collect the full overcharge and that was where the first purchaser resold the product pursuant to a pre-existing "cost-plus" contract. In such a case, the proof of a pass-on would be feasible. 392 U.S. at 494.

In the case at bar, the plaintiffs are clearly *not* first or direct purchasers of concrete block. Instead, they are indirect purchasers to the extent that concrete block is a component of the buildings which they bought. It is also clear that the pricing mechanisms through which the concrete block passed into the buildings did not involve preexisting "cost-plus" contracts or similar situations. In spite of these two dispositive facts, the Seventh Circuit has held that these indirect purchasers can sue and recover for the alleged overcharge. That result is contradictory to the policy enunciated in *Hanover Shoe.*

B. There Is A Conflict Among The Circuits On The Issue Of Whether Indirect Purchasers Can Sue And Recover For Illegal Overcharges.

Hanover Shoe, which should have resolved once and for all the issue of who could recover for an alleged overcharge for a product which goes through a chain of distribution, has not had that effect. Instead, the lower courts have failed to apply the *Hanover Shoe* decision uniformly, and a conflict among the circuits on this important issue of antitrust law has developed.

The Seventh Circuit in its decision in this case has joined the Ninth Circuit, *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co.* v. *Alaska,* 415 U.S. 919 (1974), in concluding that indirect purchasers can sue and recover for an overcharge on the theory that it has been passed on to them even though a pre-existing "cost-plus" contract situation does not exist. *See also Armco Steel Corp.* v. *State of North Dakota,* 376 F.2d 206 (8th Cir. 1967), a pre-*Hanover Shoe* decision by the Eighth Circuit. Additional authority in support of the Seventh and Ninth Circuits is as follows: *Boshes* v. *General Motors Corp.,* 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation,* 1973-2 TR.CAS. ¶74,680 (D. Conn. 1973); *Carnivale Bag Co.* v. *Slide-Rite Mfg. Corp.,* 395 F.Supp. 287 (S.D. N.Y. 1975); *Lefrak* v. *Arabian American Oil Co.,* 1975-2 TR.CAS. ¶60,621 (E.D.N.Y. 1975).

The position of the Seventh and Ninth Circuits is in conflict with the Third Circuit, which has held that indirect purchasers cannot recover for such an overcharge. *Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F.2d 1187 (3d Cir. 1971), *affirming Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 50 F.R.D. 13 (E.D. Pa. 1970).

The Seventh Circuit's decision is also in conflict with many district court decisions. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 323 F.Supp. 381 (E.D. Pa. 1970) (public entities which purchased buildings which contained price-fixed plumbing fixtures had no claim for the overcharge); *City & County of Denver* v. *American Oil Co.,* 53 F.R.D. 620 (D.Colo. 1971); *United Egg Producers* v. *Bauer International Corp.,* 312 F.Supp. 319 (S.D. N.Y. 1970); *Donson Stores Inc.* v. *American Bakeries Co.,* 58 F.R.D. 481 (S.D.N.Y. 1973); *City of Akron* v. *Laub Baking Co.,* 1972 TR.CAS. ¶73,930 (N.D. Ohio 1972); *Stern* v. *Lucy Webb Hayes,* 367 F.Supp. 536 (D. D.C. 1973); *Travis* v. *Fairmount Foods Co.,* 346 F. Supp. 679 (E.D. Pa. 1972).

C. This Case Should Be Reviewed By This Court Because The Pass-On Issue Is Of Major Importance Both To Antitrust Litigation And The Administration Of Justice.

The pass-on issue is of immense importance in antitrust litigation. Approximately 192 horizontal price-fixing cases have been brought by the federal government in the past five years. Handler and Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach,* 85 Yale L.J. 626, 636 n. 46 (1976). It is a common phenomenon that hosts of civil treble-damage actions (often class actions) are filed soon after a government case is commenced. In light of decisions such as the Seventh Circuit's, purchasers at all levels of the distribution chain (including remote purchasers such as those in this case, who have purchased something other

than the product allegedly subject to the price-fix) may now contend that an alleged overcharge was passed on to them either in whole or in part.

Antitrust litigation is well known for being complex, protracted and expensive both for the litigants and the courts. It will become even more so if the pass-on issue is interjected into these suits. 392 U.S. at 493. If, as this Court said in *Hanover Shoe* (392 U.S. at 493), the problems of proving that an overcharge was passed on are normally insuperable for the defendant, they are equally prodigious for the plaintiffs in the chain of distribution. This Court clearly indicated that it did not want the federal judiciary expending its precious and limited resources on such futile tasks as trying to determine whether there was a pass-on of an overcharge. Instead, absent a "cost-plus" situation, the first purchaser is to be allowed to sue and recover for the full overcharge. That result harmonizes the dual public interests of enforcing the antitrust laws and rationally using our judicial resources. By refusing to follow *Hanover Shoe,* courts like the Seventh Circuit are authorizing litigation which will become an insoluble morass, consuming enormous amounts of judicial energy that would otherwise be spent in other areas. Tracing an overcharge through a chain of distribution "might be an accountant's paradise, but it would be a court's purgatory." *City & County of Denver* v. *American Oil Co.,* 53 F.R.D. 620, 637 (D. Colo. 1971).

Another serious problem created by the Seventh Circuit's decision and those like it, is that defendants will be subjected to multiple recoveries (trebled) for the same alleged overcharge. Some courts speak of apportioning the overcharge among the purchasers in the chain of distribution. Putting aside the enormous effort such an exercise would take, it would not solve the problem. *Hanover Shoe* clearly holds that a defendant cannot defend against the first purchaser by showing a pass-on of the overcharge to others in the chain of distribution and the first purchaser is entitled to collect the full overcharge (trebled). If indirect purchasers can now sue the same defendant for the same overcharge (as the Seventh Circuit now holds), the defendant is subject to multiple recoveries for the same overcharge, and each recovery is trebled.*

Putting aside the issue of whether subjecting defendants to multiple recoveries (trebled) for the same overcharge violates due process, such a result is patently unfair to the defendants. Either *Hanover Shoe* should be applied to preclude suits by indirect purchasers for the overcharge, or *Hanover Shoe* should be abrogated so that defendants may raise the defense of a pass-on against the first purchaser and others in the chain of distribution.

The lower federal courts are getting the antitrust law in this key area into a tangle of considerable proportions. Only a definitive decision by this Court will clarify the situation and permit the antitrust laws to be enforced uniformly and fairly in all circuits without unduly burdening the judiciary. The issues in this case merit review by this Court.

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* While the Seventh Circuit recognized this danger, it had no solution to offer. Solutions suggested by other courts will not work. The bar of the statute of limitations will only work if fortuitously the filing of conflicting claims is just right. Collateral estoppel will not work since the party to be estopped must have had a full and fair opportunity to litigate the factual question at issue. See 1B Moore, *Federal Practice*, ¶0.411-412, 0.441[3] (2d ed. 1974). Indirect purchasers who are not parties to a prior action cannot be estopped from contending that the alleged overcharge was passed on to them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1561

STATE OF ILLINOIS, et al.,

Plaintiffs-Appellants,

v.

AMPRESS BRICK COMPANY, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION
June 22, 1976

Before FAIRCHILD, *Chief Judge,* CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This treble damage antitrust action was brought by the State of Illinois on its own behalf and on behalf of various governmental entities in the Greater Chicago area. Except for the American Brick Company,[1] the eleven defendants are manufacturers of

[1] American Brick Company was sued on the theory that it was a purchaser of concrete block for resale primarily from its production affiliate, Carey Brick Company.

concrete block. In Count I of the complaint Illinois charged that the defendants violated Section 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to fix the price of concrete block, allegedly resulting in overcharges of "an amount in excess of $3 million." Because of the treble damage provision contained in Section 4 of the Clayton Act (15 U.S.C. § 15), plaintiffs apparently sought in excess of $9 million in damages.[2]

The present lawsuit was filed after the United States had filed similar criminal and civil cases against eleven manufacturers of concrete block used in building construction in the Greater Chicago area. Pleas of *nolo contendere* were accepted in the criminal case and a consent decree was entered in the civil action. Comparable private treble damage actions brought by masonry contractors, general contractors and private builders were settled with the payment of agreed-upon sums of money. The settlements were without prejudice to this suit.

Plaintiffs assert that the defendants sold large quantities of concrete block to masonry and general contractors for incorporation in public buildings and structures. Most of the building project contracts were awarded pursuant to competitive bidding based on plans and specifications setting forth the amount and type of concrete block required. The bids submitted included the cost of the concrete block purchased from the manufacturer or masonry contractor. Thus the plaintiffs were not the first purchasers of the concrete block although they alleged that the cost of the product was passed on to them.

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[2] In Count II, plaintiffs were two named hospitals suing also on behalf of all Chicago area private hospitals (in part supported by private funds) that were damaged by purchases of concrete block. No set damages were claimed in Count II. Summary judgment was also rendered for defendants with respect to that Count.

Defendants moved for summary judgment against all plaintiffs that were not direct purchasers of concrete block from defendants.[3] In its memorandum opinion (67 F.R.D. 461), the district court first noted that the plaintiffs did not purchase concrete block indirectly pursuant to cost-plus contracts but instead purchased buildings of which concrete block was a component part. As Judge Kirkland put it, the critical issue before him was "whether parties more remote than the direct purchaser from an alleged anti-trust violator have standing to sue under Section 4 of the Clayton Act * * *." 67 F.R.D. 464.

Citing *Hanover Shoe, Inc.* v. *United Shoe Machinery,* 392 U.S. 481, the district court held that an immediate consumer or direct purchaser unquestionably has standing to sue the antitrust violator. 67 F.R.D. 466. However, relying upon our decision in *Commonwealth Edison* v. *Allis-Chalmers Mfg. Co.,* 315 F.2d 564, 567 (7th Cir. 1963); certiorari denied, *sub nom. Illinois* v. *Commonwealth Edison Co.,* 375 U.S. 834, the court held that "as to *ultimate* consumers [such as plaintiffs], their injuries are too remote and [in]consequential to provide legal standing to sue against the alleged antitrust violator." 67 F.R.D. 468. Therefore, summary judgment was granted as to this phase of defendants' motion.[4]

In private actions seeking to vindicate rights conferred by Congressional enactment, to establish standing the

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[3] Defendant also moved for summary judgment as to direct purchasers from non-defendants. The denial of this motion is not involved in this appeal. As a result of the partial summary judgment, the claims of only four governmental entities remained in the suit.

[4] Final judgment was subsequently entered thereon pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

plaintiffs must show an injury in fact that is "arguably within the zone of interests to be regulated by the statute." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 153; *Malamud* v. *Sinclair Oil Co.,* 521 F.2d 1142, 1151-1152 (6th Cir. 1975). The district court held that plaintiffs' interests as ultimate consumers were not protected by the antitrust laws. We disagree and therefore reverse.

Our holding that ultimate consumers may recover for violations of the Sherman Act is motivated by the broad language of the treble damage provision in Section 4 of the Clayton Act. It provides in pertinent part:

> "*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold damages by him sustained * * *." (15 U.S.C. § 15; emphasis supplied.)

The broad reach of a treble damage action under the Sherman Act was stressed in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236, where the Supreme Court noted that the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers * * *. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[5] No subsequent decision of that Court has confined the treble damage remedy to

[5] See also *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 262; *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.,* 381 U.S. 311, 318; *Radovich* v. *National Football League,* 352 U.S. 445, 454.

direct consumers. The sweeping language of the statute and the policy encouraging private enforcement of the antitrust laws persuade us that if plaintiffs can prove a violation which resulted in an injury to them, they ought to recover. See *Hawaii* v. *Standard Oil Co., supra,* 405 U.S. at 262; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-131.

Although the Supreme Court has not decided the issue presented here, the two courts of appeals that have squarely considered the problem have held that ultimate consumers are within the reach of the treble damage statute. In *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973), certiorari denied *sub nom. Standard Oil Co.* v. *Alaska,* 415 U.S. 919, the Ninth Circuit noted that Congressional policy favors the allowance of recovery to plaintiffs who can prove both the occurrence of an antitrust violation and that they thereby incurred substantial damage. The Court refused to confine standing under Section 4 of the Clayton Act to first-line purchasers or more remote consumers who bought goods subject to a cost-plus contract. Similarly, in *Armco Steel Corporation* v. *State of North Dakota,* 376 F.2d 206 (8th Cir. 1967), the court held that because unlawfully fixed prices could injure the ultimate consumers, North Dakota should be permitted to recover $258,255 on its indirect purchases of metal products eventually used in state highways.

The District of Columbia, Second, Fourth, Fifth and possibly the Sixth Circuits also seem hospitably inclined to the rule that ultimate purchasers may sue under Sec-

tion 4 of the Clayton Act to recover damages incurred as a result of a price-fixing conspiracy.[6]

Analysis of defendants' cases does not lead to a different conclusion. Defendants rely primarily on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481. In that case, the Court held that first-line purchasers could recover for antitrust violations even if the purchaser passed on the cost of the product attributable to the anti-competitive practice. 392 U.S. at 488. However, the Court did not enshrine privity as a requirement of recovery under the antitrust laws. See *In re Western Liquid Asphalt Cases, supra,* 487 F.2d at 196-198; *Boshes* v. *General Motors Corporation, supra,* 59 F.R.D. at 592-596. Although the Court noted that more remote purchasers might have difficulty in establishing the relationship between the antitrust violation and the injury suffered, we do not believe *Hanover Shoe* precludes those purchasers from ever recovering.

[6] See *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276, 1278, n. 4 (D.C. Cir. 1972); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 12, n. 11 (2d Cir. 1975); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 417-418 (4th Cir. 1966), certiorari denied, 385 U.S. 934; *Lehigh Portland Cement Co.* v. *City of North Bay Village* (Misc. No. 2364, 5th Cir. 1972), denying appeal in *Southern General Builders, Inc.* v. *Maule Industries, Inc.*, 1973-1 CCH Trade Cases ¶ 74,484 (S.D. Fla. 1972); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 487-488 (5th Cir. 1967). In a different context, the Sixth Circuit seems to lean the same way in *Malamud* v. *Sinclair Oil Corporation*, 521 F.2d 1142 (6th Cir. 1975). The split among the district courts was noted in *Boshes* v. *General Motors Corporation*, 59 F.R.D. 589, 592-593, n. 5 (N.D. Ill. 1973) and in the opinion below, 67 F.R.D. at 464, n. 1. We approve of those district court decisions permitting ultimate consumers to sue antitrust violators.

The Third Circuit's *per curiam* opinion in *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (1971), is cited by defendants in favor of the summary judgment below. However, a careful reading of *Mangano* shows that the affirmance was based on "the district court's sound discretion to dismiss the actions of the present appellants solely for inexcusable failure to answer interrogatories" (438 F.2d at 1188). More significantly, the failure to answer the interrogatories revealed plaintiffs' inability to show that the alleged antitrust violations were the proximate cause of the injury to the plaintiffs.[7]

Our decision in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co., supra,* is distinguishable on an identical rationale. In part, that decision was based on *Keogh* v. *Chicago & North Western Railway Co.*, 260 U.S. 156, which held that complaints against legally established regulated rates must first be addressed to the regulatory agency. 315 F.2d at 567. See *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346-347. However, like *Mangano,* the decision in *Commonwealth Edison* also rests on the failure to prove that the violations damaged the plaintiffs. Because the rates were set by an independent regulatory agency, plaintiffs could not show that the allegedly inflated prices for the generators resulted in higher prices for the electricity produced. In the next consideration of Commonwealth Edison's antitrust claim, the author of our previous opinion approved the rule of *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945), certiorari denied, 326 U.S. 734, that the Clayton Act

[7] To the extent that there is dicta that only the first consumers in a chain of distribution may sue under Section 4 of the Clayton Act, we respectfully disagree with the Third Circuit.

permits ultimate consumers to recover from antitrust violators, thereby refuting defendants' interpretation of our prior holding. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F.2d 203, 208 (7th Cir. 1964); see also *Boshes* v. *General Motors Corporation, supra,* 59 F.R.D. at 597, n. 10.

The error in defendants' reading of *Hanover Shoe, Mangano,* and *Commonwealth Edison* is that they view the failure to show that antitrust violations caused plaintiffs' injury as an element of standing. It is not. Rather, the question is one of fact (*Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648; *In re Western Liquid Asphalt Cases, supra,* 487 F.2d at 199), and any decision thereon is an adjudication on the merits. Cf. *Sierra Club* v. *Morton,* 405 U.S. 727, 741. Although in *Mangano* and *Commonwealth Edison* the facts were sufficiently clear early in the litigation to permit resolution of the case on a motion to dismiss or for summary judgment, in the instant case they are not.

We do not believe that the difficulty plaintiffs might have in proving the injury requires us to dismiss the suit. Nor do we believe that dismissal is warranted because both the immediate purchasers and the plaintiffs in this case might recover damages from the defendants. As Judge Carter pointed out in *In re Western Liquid Asphalt Cases, supra,* 487 F.2d at 200-201, according standing to ultimate purchasers need not result in double recovery because appropriate means can be found to apportion any damages that might be assessed.

To the extent that the district court held that these plaintiffs, as opposed to ultimate consumers in general, lack standing, we disagree. The plaintiffs here have alleged an injury in fact and are within the target area of

the Sherman and Clayton Acts. They have shown that they were "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *In re Western Liquid Asphalt Cases, supra,* 487 F.2d 199.

The judgment below is reversed insofar as it grants summary judgment on Counts I and II against indirect purchasers of concrete block, with costs to plaintiffs-appellants.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 73 C 2427
	)	
AMPRESS BRICK CO., INC., et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER
April 28, 1975

This cause comes before the Court on defendants' motion for partial summary judgment against all plaintiffs who have purchased concrete block indirectly through contractors on competitive bid contracts, or have made direct purchases from non-defendants.

This case is a civil antitrust suit by the State of Illinois on its own behalf and on behalf of various governmental entities in the Greater Chicago area. All defendants, except American Brick Company, manufacture concrete block. The State brings this action under Section 4 of the Clayton Act, 15 U.S.C., § 15, alleging that defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to fix the price of concrete block in the Greater Chicago area.

Approximately one-third of the more than seven hundred plaintiffs represented by the State have responded to interrogatories propounded by defendants. The responses reveal that only four of the plaintiffs purchased concrete block directly from a defendant. One plaintiff disclosed it had made direct purchases from a non-defendant. The remaining responding plaintiffs did not purchase concrete block directly from any defendant, nor did they purchase concrete block indirectly pursuant to a cost-plus contract. What these plaintiffs purchased were buildings: a package of goods and services of which concrete block was one component part.

All but nine of the responding plaintiffs awarded their building contracts pursuant to competitive bidding. The concrete block produced by defendants is sold primarily to masonry contractors who submit bids to general contractors for the masonry portions of projects. The general contractors in turn bid on an entire building project.

Defendants contend that only direct purchasers of concrete block have standing to sue the manufacturers for alleged violations of anti-trust laws.

Plaintiffs argue that the ultimate consumer of a price-fixed product should have standing to sue because the ultimate consumer bears the burden of the anti-trust violation.

The issue is whether parties more remote than the direct purchaser from an alleged anti-trust violator have standing to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Defendants argue that *Hanover Shoe, Inc.* v. *United Shoe Machinery,* 392 U.S. 481 (1968) stands for the proposition that only direct purchasers from an anti-trust violator have standing to sue the alleged violator, except in

certain limited circumstances. That case held that the trial court's refusal to hear evidence that the direct purchaser plaintiff had "passed-on" alleged illegal over-charges to its customers was not error, and that a direct purchaser's showing of payment of an illegally high price, along with the amount of overcharge, constitutes a prima facie case.

Some subsequent decisions have interpreted *Hanover* as limiting recovery to the initial or first purchaser in the chain of distribution.[1] Another line of authority is emerging to the contrary.[2]

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[1] *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *Balmac, Inc.* v. *American Metal Products Corp.*, 1972 Trade Cas. ¶74,235 (N.D. Calif. 1972); *City of Akron* v. *Laub Baking Co.*, 1972 Trade Cas. ¶73,930 (N.D. Ohio 1972); *Travis* v. *Fairmount Foods Co., Inc.*, 346 F. Supp. 679 (E.D. Pa. 1972); *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), aff'd sub nom. *Mangano* v. *American Radiator and Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *City and County of Denver* v. *American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971); *United Egg Producers* v. *Bauer International Corp.*, 312 F. Supp. 319 (S.D. N.Y. 1970). *See also, Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59, 71 (S.D.N.Y.), application denied, 337 F.2d 844 (2d Cir. 1964). *Cf. State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y.) aff'd. 440 F.2d 1079 (2d Cir.) cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *State of Minnesota* v. *United States Steel Corp.*, 8 Cir., 299 F. Supp. 596, rev'd. 438 F.2d 1380 (8th Cir. 1971). *See also, Cusick* v. *N.V. Nederlandsche Combinatie Voor Chem Ind.*, 317 F. Supp. 1022, 1024 (E.D. Pa. 1970).

[2] *In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In Re Master Key Litigation*, 1973 Trade Cases ¶74,680 (D. Conn. 1973).

In *Hanover*, a manufacturer of shoes brought suit against a shoe machinery manufacturer alleging that the machinery manufacturer's policy of leasing rather than selling shoe-making machinery led to monopolization of the industry by defendant. Defendant machinery manufacturer argued that plaintiff shoe manufacturer had passed the overcharge on to its own customers, thereby sustaining no loss. The Supreme Court rejected the "passing-on" defense, noting two grounds for its decision: (1) recognition of the defense would reduce the deterrent effect of private antitrust enforcement since the individual buyers of shoes could not effectively assert their claims; and (2) the consequent inquiry into profit and loss computations would unduly burden plaintiff and complicate the litigation.

The rationale behind the first reason was the need to preserve the effectiveness of antitrust laws. If the passing-on defense was permitted to stand, enforcement of antitrust violations would fall upon the ultimate consumer, the party least likely to bring suit:

> These ultimate consumers, in today's case the buyers of simple pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness. 392 U.S. at 494.

The Supreme Court's second reason for rejecting the pass-on defense was the Court's conclusion that normally the pass-on issue would present "insurmountable" problems of proof.

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed, a businessman may be unable to state whether, had one fact been different . . . ., he would have chosen a different price. . . . Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. 392 U.S. at 492.

The Supreme Court rejected availability of the pass-on defense to an anti-trust violator as against his direct customer. The Court's concern was that attempts to establish the defense would bog down litigation and undermine the effectiveness of the private enforcement mechanism. The Court was determined to see that the anti-trust violator not slip away on some technical ground.

Defendants here attempt to use the Supreme Court's rejection of the pass-on defense to deny standing to sue to any plaintiff not a direct purchaser from the anti-trust violator.

Stressing the distinction between "offensive" and "defensive" use of the passing-on doctrine, Judge Decker in this district recently held that "*Hanover Shoe* neither explicitly nor implicitly" creates "a general rule of 'privity' for standing to sue in a private antitrust action." *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973). Judge Decker stressed that the Supreme Court:

> . . . nowhere specifically states that *Hanover Shoe* had standing because it was in 'privity' with United Shoe or that privity is a requirement of standing in private antitrust cases. In fact, this court has searched in vain for any discussion of the question of standing in the *Hanover Shoe* opinion. If the court there had intended to establish such a rule, it clearly would have said something about the recent and substantial body of authority which had reached a contrary conclusion and permitted suits under §4 of the Clayton Act by those not in 'privity' with the alleged antitrust violator. See, e.g., . . . *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) . . . *State of Washington* v. *General Electric Co.*, 246 F. Supp. 960 (W.D. Wash. 1965). 59 F.R.D. at P. 595.

Judge Decker therefore concluded that:

> "it would be stretching *Hanover Shoe* beyond all recognition to hold that its rejection of the passing-on defense somehow returns §4 of the Clayton Act to the 'days when "privity" was king' . . . " 59 F.R.D. at p. 596.

Defendants cite a line of cases led by *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *Aff'd per curiam sub nom.*, and *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) to support their interpretation of *Hanover*. In *Mangano*, homeowners brought suit alleging that illegal overcharges by manufacturers of plumbing fixtures had increased the cost of their buildings. Plaintiffs contended that the overcharge had been passed-on through wholesalers and building contractors to them as ultimate purchasers. The Third Circuit held that *Hanover Shoe* barred plaintiffs' claims primarily on two grounds: (1) establishing that illegal overcharges were passed on would involve "insurmountable" problems of proof, and (2) suits by anyone other than the initial

purchaser would subject defendants to the risk of multiple liability.

The Ninth Circuit considered these contentions in a later decision, *In Re Western Liquid Asphalt Cases,* 487 F.2d 191 (1973), finding both questions resolvable without denying standing to non-direct purchasers. This Court agrees with the Ninth Circuit decision.

It is this Court's opinion that the Supreme Court's elaboration on the difficulties of proof encountered as to once-removed purchasers was not intended to foreclose, as a matter of law, the right of once-removed purchasers ever to sue and establish damages. Rather, the Supreme Court held that when the first purchaser sues, he need not establish that damages were not passed on because of the difficulties of proof associated therewith.

The second ground of the Third Circuit's opinion in *Mangano* was that granting standing to other than first-purchasers would subject defendants to the risk of multiple liability. This Court disagrees and notes the following language from *In Re Western Liquid Asphalt Cases, supra,* on page 201:

> Thus, in passing-on cases, the intermediary should recover the amount of the overcharge that was not passed on, if the proof shows that the ultimate consumers did not pay it all, and any lost profits resulting from increased costs. The ultimate purchasers should obtain the remainder of the overcharge, and any other damages proximately caused. Facts raising reasonable inferences, based upon appropriate market data, should suffice to go to the jury on these questions.

In a case where both the intermediary and the ultimate consumer are not before the court in the same suit, settlement or award in the first suit can be credited against the damages determined in the second suit, if greater, thereby

avoiding multiplicity of liability. In this way the antitrust laws would not be frustrated, for example, by prior settlements with initial, and perhaps friendly, purchasers.

This Court does not believe that in *Hanover* the Supreme Court intended to foreclose standing to all plaintiffs not immediate purchasers from alleged antitrust violators.

There are several types of consumers that may decide to sue.[3] The first is an *immediate consumer* (direct purchaser) who usually acts as a middleman, reselling either the same goods or a refined product to another consumer. A second is a *final consumer,* who obtains goods from the manufacturer or from a subsequent consumer, but who in either case acquires the goods in the same condition as originally made and sold by the manufacturer. The last type of consumer is an *ultimate consumer* who obtains a finished product from a middleman that has altered or added to the goods received from the manufacturer. There are, then, *two* different types of indirect consumers: the final consumer and the ultimate consumer.

The immediate consumer unquestionably has standing to sue the antitrust violator. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., Supra.*

As to the *final* consumer, many recent cases, excluding those that construe *Hanover Shoe* restrictively, grant standing to sue the antitrust violator. *State of Washington* v. *General Electric Co.,* 246 F. Supp. 960 (W.D. Wash. 1965); *Public Utility District No. 1 of Chelan County Washington* v. *General Electric Co.,* 230 F. Supp. 744 (W. D. Wash. 1964); *Armco Steel Corp.* v. *North Dakota,* 376

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[3] This breakdown is adopted from "Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine," 72 Colum. L. Rev. 395, 396 (1972).

F.2d 206 (8th Cir. 1967); *Missouri* v. *Stupp Brothers Bridge & Iron Co.*, 248 F. Supp. 169 (W.D. Mo. 1965); *State of Washington* v. *American Pipe & Construction Co.*, 274 F. Supp. 961 (W.D. Wash. 1967); *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

Standing to sue for the final consumer turns on whether the court applies the "direct injury test" or the "target area test". The direct injury approach requires plaintiff to suffer the immediate effect of the antitrust activity. This has been interpreted to apply only to the party dealing directly with the antitrust violator—the immediate consumer. All other parties are deemed to be remote and indirect. *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3rd Cir. 1910). The practical effect of this test is to require privity, although the cases rarely address themselves to that concept.

The broader target area test was first espoused in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955). In applying that test to a final consumer plaintiff, the court said he must be "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* at 55.

The Ninth Circuit has both expanded and narrowed the *Karseal* test depending upon circumstances of the particular case. In *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190 (9th Cir. 1964), the court expanded the target area to that "area which it could reasonably be foreseen would be affected by the [antitrust] conspiracy." Again, the indirect consumer granted standing was a *final* consumer. Yet in the recent case of *Hawaii* v. *Standard Oil Co.*, 431 F.2d 1282, aff'd 405 U.S. 251 (1972), the court refused standing to sue in an action by the state as *parens*

patriae on behalf of its citizens suing for alleged injury to the general economy. The court stated that the injury of the citizens was too incidental or remote to create standing to sue.

Acceptance of the *ultimate* consumer as plaintiff in an antitrust action has been less enthusiastic. One of the few cases to grant standing to an *ultimate* consumer is *In Re Master Key Antitrust Litigation*, 1973 Trade Cas. ¶74,680 (D. Conn. 1973). This is not to say that the arguments of ultimate consumers are entirely without merit, or that successful arguments made on behalf of other indirect consumers are in no way applicable to ultimate consumers The Court merely notes that, based upon legal precedent, ultimate consumers have rarely been granted standing to sue as distinguished from other indirect consumers.

The Seventh Circuit stated its position as to ultimate consumers in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963). This was an antitrust suit brought by a utility against a manufacturer of electrical equipment, charging conspiracy to fix prices. The State of Illinois sought to intervene as plaintiff on behalf of consumers of electrical energy. In denying intervention, the Court said:

> Could the State of Illinois bring a direct action against defendants? The answer is "no", because there was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote and took the shape of allegedly higher rates paid for utility services—rates established as legal by the Illinois Commerce Commission. Although these rates may be determined to have been unreasonable because of conspiratorially fixed equipment costs which went into the basic rate structure, that is another issue not cognizable in these antitrust actions, 315 F.2d at 567.

The Seventh Circuit's holding that the injury to the consumer was too remote to grant standing to sue is binding upon this Court. This Court therefore holds that, as to *ultimate* consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator.

Defendants next move for summary judgment against all plaintiffs who have made direct purchases from non-defendants. Defendants argue that plaintiffs have alleged purchases only from defendants, and that non-defendants from whom purchases were made are not alleged to be conspirators.

Where a horizontal conspiracy is charged and proven, a defendant is liable for all damages sustained by reason of sale at non-competitive prices by all conspirators, *whether named as defendants or not.* Further, case law supports the proposition that a defendant would be liable for damages suffered as a result of purchases from non-conspirators who nevertheless charged prices identical with or close to those of their conspiring competitors. *Well Products Co.* v. *National Gypson Co.*, 357 F. Supp. 832 (N.D. Cal. 1973); *State of Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802 (W.D. Wash. 1968).

Defendants are granted summary judgment against all non-direct purchasers of concrete block that constitute ultimate consumers as defined in this opinion. Defendants' motion for summary judgment as to direct purchasers from non-defendants is denied.

ENTER:

/s/ *Alfred Y. Kirkland,* Judge

DATED: April 28, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 73 C 2427
	)	
AMPRESS BRICK CO., INC., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

April 28, 1975

Enter Memorandum Opinion and Order.

Defendants are granted summary judgment against all nondirect purchasers of concrete block that constitute ultimate consumers as defined in this opinion. Defendants' motion for summary judgment as to direct purchasers from non-defendants is denied.

/s/ *Kirkland, J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STATE OF ILLINOIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 73 C 2427
	)	
AMPRESS BRICK CO., INC., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER FOR FINAL JUDGMENT
May 6, 1975

On motion of plaintiffs for entry by the court of an order for final judgment:

On motion of defendants for summary judgment, Ordered that all plaintiffs who are non-direct purchasers and who are ultimate consumers as defined in court's opinion of April 28, 1975 are hereby dismissed from the action. Enter Order of Final Judgment against all such plaintiffs, pursuant to Rule 54(b), F.R.C.P.

/s/ Kirkland, J.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1561

STATE OF ILLINOIS, et al.,

Plaintiffs-Appellants,

vs.

AMPRESS BRICK COMPANY, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JUDGMENT
June 22, 1976

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED in so far as it grants summary judgment on Counts I and II against indirect purchasers of concrete block, with costs to plaintiffs-appellants, in accordance with the opinion of this court filed this date.